PRIVY COUNCIL REPORT

Tominam bte Tukimin v Toh Kai Chup

PRIVY COUNCIL (ON APPEAL FROM SINGAPORE) – PRIVY COUNCIL APPEAL NO 69 OF 1986
LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK, LORD OLIVER OF AYLMERTON, LORD GOFF OF CHIEVELEY AND LORD JAUNCEY OF TULLICHETTLE
11 APRIL 1989

Civil Procedure – Appeals to the Privy Council – Concurrent findings of fact by lower courts – Practice to disallow appeals – Refusal to allow amendment on statement of claim – Whether exception to rule of no appeals applicable

The plaintiff appellant, a pedestrian, was injured in an accident with the defendant, a motor cyclist. The plaintiff started an action in the High Court but the judge found that the accident was caused solely by the negligence of the plaintiff (see [1985] 2 MLJ 345). On appeal to the Court of Appeal, the court upheld the High Court's decision. The plaintiff then appealed to the Privy Council. The plaintiff argued that the trial judge had refused to allow the plaintiff to amend her statement of claim to make an alternative allegation as to the place of the accident.

Held, dismissing the appeal:

(1) Although the judge had refused to allow the amendment, this had not affected the outcome of the trial as the judge had examined the alternative allegation and had examined the facts fully.

(2) The normal rule is that the Privy Council would not entertain appeals from concurrent findings of fact from lower courts. This case did not come within any of the exceptions laid down in *Srimati Bibhabati Devi* v *Kumar Ramendra Narayan Roy & Ors.*[1]

Case referred to

1 *Srimati Bibhabati Devi* v *Kumar Ramendra Narayan Roy & Ors* [1946] AC 508 (folld)

V Ramakrishnan for the plaintiff appellant.

Julian Priest QC and *Christopher Lau* for the defendant respondent.

Lord Bridge of Harwich (delivering oral judgment of the court): This is an appeal from a judgment of the Court of Appeal of Singapore dismissing an appeal from the judgment of Mr Justice Chua, the trial judge, who had dismissed the claim of the plaintiff appellant for damages for personal injuries sustained in a road accident when she, a pedestrian, was in collision with the defendant riding a motor cycle.

The learned judge set out in his judgment the evidence which was given by the defendant motor cyclist in these terms:

> He was riding along Teck Whye Avenue. He had come from Choa Chu Kang Road and was going to his elder brother's house at Teck Whye Avenue. He was travelling in the middle of the road at a speed of between 40-50 km/h. There was a slight bend in the road. As he was rounding the bend he saw two women crossing the road from his left to his right and they were close to the centre white line. When he first saw them they were 14 to 15 feet away ahead of him and to his right. He slowed down and steered to his left. Suddenly one of these women, the plaintiff, turned around and ran back across the road and in doing so she collided into his motor cycle. The plaintiff fell and he quickly stopped his motor cycle and placed it on its side on the kerb at the side of the road. The plaintiff was then carried to the side of the road.

The learned trial judge accepted in substance that account. He expressed his findings in these terms:

> The defendant was travelling in the middle of the road and the plaintiff was to his right. He could have passed her without going to the left but he veered to the left. The plaintiff suddenly turned round and walked fast into the motor cycle. That was how the accident happened. It is clear that if the plaintiff had not turned round suddenly to walk back fast in the direction from which she had come this accident would not have happened, because in doing so she collided into the motor cycle. There is no evidence that the defendant was travelling at a fast speed or that the defendant should have seen the plaintiff earlier. It does not matter at what speed the defendant was travelling or whether he could have seen the plaintiff earlier or not as whatever evasive action taken by the defendant would have been in vain. The plaintiff turned around suddenly and walked fast into the motor cycle. The defendant had no opportunity to avoid the accident.
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> I find that the accident was caused solely by the negligence of the plaintiff.

Those findings of the learned judge were attacked in the Court of Appeal. In particular the Court of Appeal was invited to find that the defendant had, at least in part, been responsible for the accident by his negligence. The Court of Appeal concluded its judgment in these terms:

> This morning, it was urged upon us that there is some contributory negligence on the part of the motor cyclist. On the brief facts stated as it was the appellant who had collided into the motor cyclist after the latter had taken evasive action, there was not contributory negligence on the part of the motor cyclist.

In those circumstances counsel for the appellant, who has done his best in a difficult situation, is confronted with the very well-established practice of this Board not to entertain appeals against concurrent findings of fact from two courts below in any case where appeal lies to the Judicial Committee of the Privy Council. The scope of this practice and the extremely narrow exceptions to it are very clearly stated in the headnote to the judgment of the Board in the case of *Srimati Bibhabati Devi* v *Kumar Ramendra Narayan Roy & Ors.*[1] Their Lordships do not find it necessary in this judgment to set out the terms of that headnote, which are very familiar.

The only contention advanced on behalf of the present appellant which could possibly have brought this case anywhere near the ambit of any of the exceptions to

the general practice was a complaint that the appellant had been denied an opportunity to amend her statement of claim in the course of the trial before Mr Justice Chua. The case as originally pleaded on behalf of the plaintiff, who unfortunately had lost her memory and therefore was not able to give evidence herself about the circumstances in which this accident happened, set out that she had been standing on the grass verge waiting to cross the road and it was there that the defendant motor cyclist collided with her. In the course of the trial an application was made to amend that pleading to allege alternatively that the accident occurred, as of course on the judge's findings it did, when the plaintiff was crossing the road; but it is noteworthy that the particulars of negligence alleged against the defendant motor cyclist were no different in the proposed amendment from the original pleading in the statement of claim. If their Lordships had thought that the judge's refusal to allow this amendment had in any way affected the outcome of the trial, then possibly (it is unnecessary to say more than that) this case might have been considered as falling within the ambit of the exceptions to the rule against entertaining appeals from concurrent findings of fact.

Their Lordships are quite satisfied that nothing in the event turned on the pleading point. This is not a case where the judge said 'I dismiss the plaintiff's case because the only case pleaded is that she was standing on the grass verge when the accident happened and that case has not been established'. On the contrary, he went into the facts very fully and found as already stated that the accident happened when the plaintiff, having set out to cross the road, then suddenly, as already described, turned back and effectively walked into the path of the motor cyclist, so that the judge's refusal to allow the proposed amendment in the event did not influence the result in any way.

This case falls to be decided as one which falls fairly and squarely within the practice of this Board not to entertain appeals against concurrent findings of the two courts below. Accordingly the appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Le Brasseur & Monier-Williams*; *Barlow Lyde & Gilbert.*

Reported by *Terence Tan Bian Chye*

SINGAPORE REPORTS

Algemene Bank Nederland NV v Loo Choon Yow

HIGH COURT (SINGAPORE) – BANKRUPTCY NO 396 OF 1988
CHAN SEK KEONG J
15 MARCH 1989

Evidence – Burden of proof – 'Debtor' within the Bankruptcy Act – On whom duty to prove change of domicile lay

Bankruptcy – Whether within definition of 'debtor' under the Bankruptcy Act – Whether debtor had changed domicile – Bankruptcy Act (Cap 20, 1985 Ed), s 3(3) – Bankruptcy Rules 1967, rr 17, 25 & 122

The petitioning creditor had obtained judgment against the judgment debtor but following the latter's failure to pay the debt, a bankruptcy notice was served by the petitioning creditor against the judgment debtor. The bankruptcy petition was then filed. Paragraph 2 of this petition stated that the judgment debtor had for the greater part of six months preceding the presentation of the petition resided in Singapore, within the jurisdiction of the court. The bankruptcy notice and petition were both served on the judgment debtor by way of substituted service through advertisement in the newspapers. LCB, the judgment debtor's brother, then filed an affidavit in which he deposed that he had personal knowledge that the judgment debtor was not residing in Singapore since late 1985, that he had married a Taiwanese lady and since 1985 had been domiciled and residing in Taiwan and did not own any dwelling house or have a place of business in Singapore. Another person, CKK, an accountant, who said that he had handled the judgment debtor's financial affairs since the judgment debtor had left Singapore, also filed an affidavit confirming the affidavit of LCB.

Held, granting the petition:

(1) The burden was on the petitioning creditor to satisfy the court that the judgment debtor was a debtor for the purposes of s 3 of the Bankruptcy Act but this burden had been discharged by reference to the judgment debtor's passport and to another exhibit (a certificate issued by the Trade Mission of the Republic of China in Singapore) produced by the judgment debtor which showed that he was born in Singapore and that he was a Singapore citizen.

(2) The affidavits of the judgment debtor's witnesses were rejected on the grounds that they were hearsay. Whether the judgment debtor had changed his domicile was a matter within the personal knowledge of himself, so the witnesses could not say that they had personal knowledge of this matter.

(3) As regards the statements that the judgment debtor had married a Taiwanese lady, had a son and purchased a house in Taiwan with the intention of residing there permanently, no documentary evidence was produced to show any of these facts.

(4) The judgment debtor's passport showed that he had travelled extensively to many countries from 1985 to 1988. But frequency of travel does not prove a change of domicile nor did the judgment debtor himself so allege.

(5) The judgment debt was not denied, the petitioning creditor had discharged the burden of proving that the judgment debtor was a debtor at the time the bankruptcy notice